Supreme Court, U.S.
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In The Supreme Court of the United States

ABOLALA SOUDAVAR,
Petitioner,

v.

FEDERAL AVIATION ADMINISTRATION,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS

1 – Whether the Nuremberg trials have any relevancy today, and whether the crimes and the wrongdoings that German judges were accused of, and convicted for, are once again deemed to represent acceptable behavior?

2 - Whether 5USC 702 (2000) can provide injunctive relief if Iranian citizens are designated as a "suspect class" en bloc, irrespective of name, sex, age or residency status?

3 - Whether the still valid 1957 *Treaty of Amity, Economic Relations, and Consular Rights Between the United States of America and Iran,* as Supreme Law of the Land, waives the soveriegn immunity of the FAA if a) said agency has conducted business activities in Iran, and b) whether it provides jurisdictional rights if the FAA has violated rights conferred by the Treaty?

4- What should be the minimum standard for logic in evaluating prima facie evidence?

LIST OF PARTIES - All parties appear in the caption of the case on the cover page.

CORPORATE DISCLOSURE STATEMENT (Rule 29(6)) – Pro se Petitioner is acting on his own behalf and as a person.

TABLE OF CONTENTS

Table of Authorities iv
Petition for writ of certiorari 1
I . Opinions Below 1
II . Jurisdiction 1
III . Statutory Provisions 1
IV . Statement of the case 2
V . Sequence of Judicial events 2
VI . Reasons for granting the writ 4
A - Preliminary Remarks 4
B . Prima facie evidence 7
C . Injunctive relief 8
D . Treaty of Amity 11
E . Violation of rights conferred by the Treaty of Amity 15
VII . Conclusion 17

INDEX TO APPENDIXES

APPENDIX A – Opinion of the Court of Appeals
APPENDIX B – Final Order of the District Court
APPENDIX C – Memorandum and Order of the District Court
APPENDIX D – Excerpts from Appellant's Brief

TABLE OF AUTHORITIES

Cases

Avery v. Georgia, 345 U.S. 559 (1953).....8
Berkovitz v. Islamic Republic of Iran, 735 F.2d 329, at 333 (9th Cir.1984).....13, 14
Dow Chemical Co. Castro Alfaro, 786 S.W.2d 674 (Supreme Court of Texas 1990).....12
Gibbons v. Republic of Ireland, 532 F.Supp. 668, 672 (D.D.C.1982).....14
Graham v. Richardson, 403 U.S. 365, 372 (1971).....10
Gulf Oil v. Gibert, 330 US 501, (1947).....13
Harris Corp. v. National Iranian Radio and Television, 691 F.2d 1344, 1350 (11th Cir.1982).....14
Hirabayashi v. United States, 320 U.S. 81, 100 (1943).....9
Hurtado v. California, 110 US (1884).....8
Kaufman v. Anglo-American School of Sofia, 28 F3d 1223 (D.C. Cir. 1994).....10
Koster v. Lumbermens Mutual Casualty Co, 330 US 518 (1947).....12
Lujan v. National Wildlife Federation, 497 U.S. 871, 882 (1990).....11
Mathews v. Diaz, 426 U.S. 67 (1976).....3
McLaughlin v. Florida, 379 U.S. 184, 192 (1964).....9
Plyler v. Doe, 457 U.S. 202 (1982).....9, 10, 5
Reuber v. United States, 750 F2d 1039, 1061 (D.C. Cir. 1994).....10
Richmond Tenants Organozation, Inc v. Kemp, 956 F 2d 1300, 1306 (4th Cir. 1992).....10
San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 28 (1973).....10
Security Pacific National Bank v. The Government and State of Iran, 513 F.Supp. 864, 880 n. 23 (C.D.Cal.1981).....14
Soudavar v. Islamic Republic of Iran, 186 F.3d 671.....13
Taylor-Callahan-Coleman Counties Dist Adult Probation Dep't v. Dole, 948 F.2d 953, 958 (5th Circuit. 1991).....11
United States v. Carolene Products Co., 304 U.S. 144, 152 - 153, n. 4 (1938).....10

USA v. Alstoetter et al. 3 T.W.C. 1 (1948), 6 L.R.T.W.C. I (1948), 14 Ann. Dig. 278 (1948) 4

Statutes

(49 USC 44901) 11
(49 USC 44902). 11
28 U.S.C. §1254 (1) 1
5USC 702 (2000) 10

Other Authorities

Treaty of Amity, Economic Relations, and Consular Rights Between the United States of America and Iran, June, 16, 1957; 8 U.S.T. 899, T.I.A.S. 3853, 284 U.N.T.S. 931, 14, 15, 16

Constitutional Provisions

Article VI of the U.S. Constitution 2

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2002

PETITION FOR WRIT OF CERTIORARI

Petitioner Abolala Soudavar seeks the reversal of the decision of the United States Court of Appeals for the Fifth Circuit for reasons stated below.

I. OPINIONS BELOW

The opinion of the Court of Appeals is not reported but produced in Appendix A. The District Court's final Order of dismissal and it's initial Order and Memorandum are both unreported and therefore produced in Appendixes B and C respectively.

II. JURISDICTION

A. The decision of the Court of Appeals was filed on June, 28, 2002.

B. A Petition for Rehearing en Banc was filed on July 11th, 2002. It was denied on Oct. 9, 2002.

C. The jurisdiction of this Court is conferred by 28 U.S.C. §1254 (1).

III. STATUTORY PROVISIONS

The Treaty of Amity

The *Treaty of Amity, Economic Relations, and Consular Rights Between the United States of America and Iran,* June, 16, 1957; 8 U.S.T. 899, T.I.A.S. 3853, 284 U.N.T.S. 93 ("Treaty of Amity") is a self-executing treaty approved by a

2/3 majority of the Senate and ratified by the President of the United States, and by virtue of Article VI of the U.S. Constitution, is the Supreme Law of the Land. *It is still valid* and guarantees, on a reciprocal basis, certain rights for both Americans and Iranians.

5USC 702 (2000) – can waive the sovereign immunity of the US government for injunctive relief purposes.

IV. STATEMENT OF THE CASE

The following facts were presented through an affidavit to the District Court and were never denied by the FAA:

- Plaintiff had been regularly subjected to an onerous search of checked-in luggage for both outbound and inbound flights, prior to 9/11.
- The search was triggered by the *mere showing of an Iranian passport* without any computer-generated information, irrespective of the name and status of the Iranian traveler (whether he was a legal resident or not).
- Continental Airlines and FAA employees confirmed to Plaintiff that a systematic search policy for all Iranian passport-holders was indeed in place and an affidavit was produced in this respect.
- The FAA used custom officials in France to perform security checks.
- The FAA has had business activities in Iran and a proof of such activity was submitted to the District Court.

V. SEQUENCE OF JUDICIAL EVENTS

- Plaintiff-Petitioner's Original Complaint was filed with the US District Court (Southern District of Texas, Houston Division), on 1/30/2001 for the designation of Iranian passport holders as a "suspect class", whether legal aliens or not.

- In his initial Memorandum and Order of 7/5/2001 (Appendix C), Judge K. Hoyt denied the FAA's motion to dismiss Plaintiff-Petitioner's "claims for injunctive relief."
- The FAA proceeded with a Motion for Reconsideration, and then, discovering the futility of its own arguments, filed an unusual second round Reply to Response to Motion to Dismiss that further magnified the FAA's lack of direction and justification for its actions.[1]
- Plaintiff's final reply was filed 9/5/01, and on 9/26, i.e. two weeks after 9/11, Judge Hoyt dismissed the case in a two-line order without any explanation and *without sanctifying any of the FAA's arguments* (Appendix B).
- An Appeal Brief was filed on 12/20/01 and a Reply Brief to FAA's response was filed on 1/31/02. The Circuit Court's decision was issued on Friday 6/28/02.
- In denying our request for a Rehearing en Banc, not one judge of the 5th Circuit had the courage to uphold the law.

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[1] In the last instance, the FAA even claimed that discrimination against aliens is not unconstitutional! Citing *Mathews v. Diaz*, 426 U.S. 67 (1976), it made a mockery of the lucid opinion written by Justice J. P. Stevens for that case. Said opinion had made a clear distinction between the rights of resident aliens and, the "welfare benefits" or more generally "a share in the bounty that a conscientious sovereign makes available to its own citizens and some of its guests"; *at* 80. While said opinion recognized a possible variation in the administration of benefits, it categorically rejected deprivation of liberty and rights ("Even one whose presence in this country is unlawful, involuntary, or transitory is entitled to that constitutional protection"). Only a tortured mind would recognize the subjection of aliens to onerous security search procedures as a "share of bounty" and not a deprivation of liberty and rights.

VI. REASONS FOR GRANTING THE WRIT

A- Preliminary Remarks

In Nazi Germany, citizens were asked to declare their religion, and if they were Jews, they had to wear a *yellow star* and were discriminated against (to say the least). Seven decades later, in the United States of America, residents are asked to show their passports, and if they are in the *red color* of an Iranian passport, they are automatically subjected to discriminatory procedures.

In a post 9/11 talk at Harvard Law School, Justice Breyer drew an imaginary line dividing those who "really stand for law, reason, civilization, against those forces that think of violence and terrorism" and saw "reliance on law, and courts, and what [he] call[ed] reason, as protectors of both security and basic human rights."[2] The problem, though, is that, in many instances, an ill-conceived "reason of state" trumps "reason" itself. In Germany, law and reason were sacrificed to prevent the Jews from "undermining" the achievements of the Third Reich. Today, in the USA, law and reason is sacrificed to counter an imaginary threat from Iranian citizens en bloc.

As noted in the trial proceedings of the German Judge Schlegelberger at Nuremberg,[3] Hitler had decreed that:

> "If an act deserves punishment according to the common sense of the people but is not declared punishable in the Code, the prosecution must investigate whether the underlying principle of a penal law can be applied to the act and whether justice can be helped to triumph by the proper application of the penal law."

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[2] Judicial Issues, Speech 167783 of 12/11/2001, C-Span Archives.

[3] See *USA v. Alstoetter et al.* 3 T.W.C. 1 (1948), 6 L.R.T.W.C. I (1948), 14 Ann. Dig. 278 (1948). http://www.law.umkc.edu/faculty/projects/ftrials/nuremberg/Alstoetter.htm

and the tribunal opined:

> "This new conception of criminal law was a definite encroachment upon the rights of the individual citizen because it subjected him to the arbitrary opinion of the judge as to what constituted an offense. It destroyed the feeling of legal security and created an atmosphere of terrorism. This principle of treating crimes by analogy provided an expedient instrumentality for the enforcement of Nazi principles in the occupied countries."

Crime by analogy seems to be the driving force behind the decisions of the US intelligence community, although one does not understand how it is applied to Iranians.[4]

More relevant, however, is the parallelism of our case to accusations levied against Schlegelberger in respect to the Klinzman episode: A courageous German judge had tried the policeman Klinzmann, and convicted him of brutality and sentenced him to a few months imprisonment, for beating a milk-hand by the name of Bloodling. Himmler protested and wrote to Schlegelberger:

> "I must reward his action because otherwise the joy of serving in the police would be destroyed by such verdicts. But finally K[linzmann] has to be rehabilitated in public because his being sentenced by a court is known in public."

Schlegelberger then quashed the proceedings against Klinzmann.

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[4] Not one single Iranian has been named to be a member of the Al-Qaeda or Taliban groups. As a matter of fact, the only crime committed by an agent of the Islamic Republic of Iran on US soil was the murder of an Iranian subject by a Black-Muslim American. One wonders then, if based on this evidence, and by FAA's crime by analogy logic, whether all Black-Muslim Americans, or all African-Americans or all Americans should be classified as a suspect group!

In the instant case, a courageous Federal Judge, Kenneth Hoyt, initially ruled in our favor against the FAA. Even though he subsequently dismissed the case in the aftermath of 9/11, he did not validate the claims and arguments of the FAA, and did not try to justify them in legal terms. His order simply signaled a belief that our case was inappropriate in the traumatic period after 9/11. A year later, the 5th Circuit had no reason to remain "traumatized" and act like a Schlegelberger who succumbed to Hitler's decree that prescribed punishment according to "the common sense of the people" rather than according to law. It quashed our appeal to give free hand to the FAA, lest the "joy" of the security apparatus be undermined.

In this climate of frenzy propagated by the government's disjointed security policies, it is the law that must upheld and not the "joy" of the CIA chief who declared war on Al-Qaeda but only assigned *one* full-time analyst to it, or the head of the National Security Council who now claims:

> ""I don't think anybody could have predicted that these people would take an airplane and slam it into the World Trade Center . . . that they would try to use an airplane as a missile, a hijacked airplane as a missile."[5]

Such statement must be considered as either the epitome of stupidity or an utmost exercise in hypocrisy (if not both). In any event, it is indicative of how unreliable is the *raison d'état* for which the sanctity of the written law is being sacrificed.

One did not need to have the resources of the NSC at its disposal to conclude, as we did in our Original Complaint (see Appendix D), that:

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[5] Condoleezza Rice's pronouncement from last May, as reported by frank Rich in the New York Times of September 28, 2002.

- the search-procedure devised for Iranians was indeed indicative that they were suspected as suicide-bombers,
- that suicide-bombers were indoctrinated individuals whom the Intelligence Community should have tracked and tagged at their indoctrination camps,
- that ineptitude and cronyism were the hallmarks of a US Intelligence Community that was reluctant to attack or pursue the Al-Qaeda monsters that they themselves had created,
- that the US, not only did not stop the Saudis from funding the Talibans and Al-Qaeda, but was itself contributing at that time some $40 million dollars every 6 months to the Talibans (supposedly for opium eradication which the main Taliban source of income)
- that despite all the indictments against Saudi individuals who had bombed US embassies and military barracks, it was the Iranians who were branded as "suspects" and not the Saudis.

Such eschewed favoritism towards Saudis and misguided animosity towards Iranians, obviously did not bring security to US passengers. The victims of 9/11 more than being the victims of Bin-Laden, were the victims of those who felt unwilling to spoil the "joy" of an inept Intelligence Community in their unholy alliance with fanatical Saudis.

B. Prima facie evidence

In contrast to miscellaneous discrimination charges brought against the FAA, the potency of our case rested on the strength of its prima facie evidence, *none of which was ever contested by the FAA*:

- that the mere sight of an Iranian passport triggered the search, irrespective of the person's name, sex, age, or residency status

- both, airline and FAA, officials had confirmed that Iranian passport holders were earmarked in advance for the extensive luggage search, and an affidavit was submitted to that effect.

The most simple mind can understand that the presented prima facie evidence clearly indicates that Iranians had been designated as a "suspect class," *en bloc*. And yet, the mighty judges of the 5th Circuit pretend that "Soudavar fails to establish an FAA policy of extensive screening of Iranian passengers" (Appendix, A-2).

The modicum of logic necessary to conclude from the facts that Iranians are classified as a suspect class, is certainly less than what the Supreme Court used in *Avery v. Georgia,* 345 U.S. 559 (1953), when it stated that the use of separately colored tickets for jury selection in Fulton County "constituted 'prima facie evidence of discrimination.'" Here, the mere color of the Iranian passport triggered the search.

In addition, the FAA never contested our affidavits pertaining to the airline and FAA officials' confirmation of such policy. As facts, they remain uncontroverted.

Finally, the District Court's initial Memorandum and Order was obviously based on the acceptance of same primary evidence that the 5th Circuit wants to ignore.

C. Injunctive relief

Hurtado v. California, 110 US 516, 528, 532, 536, (1884), informs us that judicial process is the only remedy against government abuse of constitutional rights:

> "Arbitrary power, enforcing its edicts to the injury of the persons and property of its subjects, is not law, whether manifested as the decree of a personal monarch or of an impersonal multitude. And the limitations imposed by our constitutional law upon the action of the governments, both state and national, are essential to the preservation of public and private rights, notwithstanding the

> representative character of our political institutions. The enforcement of these limitations by judicial process is the device of self-governing communities to protect the rights of individuals and minorities, as well against the power of numbers, as against the violence of public agents transcending the limits of lawful authority, even when acting in the name and wielding the force of the government." *Hurtado v. California*, 110 U.S. 516, 528, 532, 536 (1884).

and *Plyler v. Doe*, 457 U.S. 202 (1982), ascertains that legal residents are subject to the same protection and jurisdiction as the citizens of the US, and that the constitution requires people to be judged *individually* and not as a "suspect" class of citizens:

> "Every citizen or subject of another country, while domiciled here, is within the allegiance and the protection, and consequently subject to the jurisdiction, of the United States"; *United States v. Wong Kim Ark*, 169 U.S. 649 (1898), *Plyler v. Doe*, 457 U.S. 202 (1982), FN 10.

> "Several formulations might explain our treatment of certain classifications as "suspect." Some classifications are more likely than others to reflect deep-seated prejudice rather than legislative rationality in pursuit of some legitimate objective. Legislation predicated on such prejudice is easily recognized as incompatible with the constitutional understanding that each person is to be judged individually and is entitled to equal justice [457 U.S. 202, 217] under the law. Classifications treated as suspect tend to be irrelevant to any proper legislative goal. See *McLaughlin v. Florida*, 379 U.S. 184, 192 (1964); *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943). Finally, certain groups, indeed largely the same groups, have

> historically been "relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." *San Antonio Independent School Dist. v. Rodriguez,* 411 U.S. 1, 28 (1973); *Graham v. Richardson,* 403 U.S. 365, 372 (1971); see *United States v. Carolene Products Co.,* 304 U.S. 144, 152 -153, n. 4 (1938). The experience of our Nation has shown that prejudice may manifest itself in the treatment of some groups. Our response to that experience is reflected in the Equal Protection Clause of the Fourteenth Amendment. Legislation imposing special disabilities upon groups disfavored by virtue of circumstances beyond their control suggests the kind of "class or caste" treatment that the Fourteenth Amendment was designed to abolish." (emphasis added) *Plyler v. Doe*, 457 U.S. 202 (1982), FN 14.

In his initial Memorandum and Order, the District Court not only saw merit in the above arguments but also added that where non-monetary injunctive relief is sought against constitutional torts, the government's sovereign immunity is waived as per 5USC 702 (2000).[6] Citing *Richmond Tenants Organization, Inc v. Kemp,* 956 F 2d 1300, 1306 (4th Cir. 1992) and *Reuber v. United States,* 750 F2d 1039, 1061 (D.C. Cir. 1994), *overruled on other grounds by Kaufman v. Anglo-American School of Sofia,* 28 F3d 1223 (D.C. Cir. 1994), the District Court further added that "even without explicitly resorting to section 702, courts have traditionally presumed that injunctive relief is available

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[6] An action in the court of the United States seeking relief other than monetary damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that is against the United Sates.., 5USC 702 (2000).

against federal actors who commit constitutional violations", (Appendix C-8).

The 5th Circuit argued in response that when "review is sought not pursuant to specific authorization in the substantive statute, but only under the general review provisions of the APA, the 'agency action' in question must be 'final agency action.'" *Lujan v. National Wildlife Federation*, 497 U.S. 871, 882 (1990). And then, it sought the definition of 'final agency action' in *Taylor-Callahan-Coleman Counties Dist Adult Probation Dep't v. Dole,* 948 F.2d 953, 958 (5th Circuit. 1991) where 'final' is explained to hinge on several factors, a) including whether the challenged action is a definitive statement of the agency's position; b) whether the action has the status of law with penalties for noncompliance; c) the directness and immediacy of the action's impact upon the plaintiff, and whether immediate compliance is expected (Appendix A-2).

All three factors cited above apply to our case and yet the 5th Circuit claims that "there has been no final agency action."

The screening process is imposed by the FAA on airlines by statute (49 USC 44901), and that the least penalty for not accepting the search is a *mandatory* refusal by airlines to carry the passenger who objects to it (49 USC 44902).

Because Petitioner is at the receiving end of the screening process, it is obvious that the FAA's screening policies have a direct impact on him and compliance is expected. The FAA's actions are as final as they can be.

D. Treaty of Amity

In addition to 5USC 702 (2000), we contend that the sovereign immunity of the FAA is waived by virtue of Paragraph 4 of Article XI of the treaty:

> "No enterprise of either High Contracting Party, including corporations, associations, and government agencies and

> instrumentalities, which is publicly owned or controlled shall, if it engages in commercial, industrial, shipping or business activity within the territory of the other High Contracting Party, claim or enjoy, either for itself or for its property, immunity therein from taxation, suit, execution of judgment or other liability to which privately owned and controlled enterprises are subject therein"

Indeed, we produced evidence that the FAA had conducted business in Iran, which the FAA did not deny, and therefore by virtue of the above, Plaintiff-Petitioner was entitled to bring suit against the FAA in Iran, and the agency's immunity was waived *therein*, i.e. in Iran.

The question then is: if Plaintiff has the right to bring suit against the FAA in Iran because its immunity is waived there, has he the same right here? We argued that the answer is yes and what allows it is the doctrine of "*forum non conveniens*".

As noted by Justice Doggett in a concurring opinion for *Dow Chemical Co. Castro Alfaro*, 786 S.W.2d 674 (Supreme Court of Texas 1990): "The proffered foundations for it (doctrine of *forum non coveniens*) are considerations of fundamental fairness and sensible and effective judicial administration". Moreover, according to one of the milestone cases for this doctrine *Koster v. Lumbermens Mutual Casualty Co*, 330 US 518 (1947) at 524:

> When there are two parties to a dispute, there is good reason why it should be tried in the plaintiff's home forum if that is his choice. He should not be deprived of the presumed advantages of his home jurisdiction except upon a clear showing of facts which either (1) establish such oppressiveness and vexation to a defendant as to be out of all proportion to plaintiff's convenience, which may be shown to be slight or nonexistent, or (2) make trial in the chosen forum inappropriate because of

considerations affecting the court's own administrative and legal problems."

Since Plaintiff is an Iranian residing in Texas, his home forum is here and therefore he should be able to plead his case in this forum according to the conditions available in Iran, including the waiver of sovereign immunity of the FAA, because once the latter's immunity is waived vis-à-vis Plaintiff in the Iranian forum, it is waived absolutely and not conditionally.

A second milestone case, *Gulf Oil v. Gibert*, 330 US 501, (1947) at 508, stipulates that the factors which make the application of this doctrine possible include:

> "the relative ease of access to sources of proof; availability of compulsory process of attendance of unwilling, and the cost of obtaining the attendance of willing, witnesses; ... the enforceability of judgment"

It is obvious that none of the above considerations can be made available in Iran while they are available and enforceable here. The FAA employees will not go to Iran as witnesses, and the FAA will not heed the summons of an Iranian court. The switch to an Iranian forum is simply not an alternative for Plaintiff who has not returned to his country for the last twenty years.

The 5th Crcuit's answer to our above arguments is to quote out of context two lawsuits, *Soudavar v. Islamic Republic of Iran*, 186 F.3d 671, at 674-75, and *Berkovitz v. Islamic Republic of Iran*, 735 F.2d 329, at 333 (9th Cir.1984), (Appendix A-3). The former is based (through a judicial subterfuge one must say)[7] on the latter, and does not

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[7] *Soudavar v. Islamic Republic of Iran* is again a faulty decision in which through judicial subterfuge and using an incorrect translation of the name of one of the defendants, Sazmane Gostaresh Va Nosaz-e-Iran by calling it the *Department* of Expansion and New Development of Iran (at 673 and 675), the 5th Circuit transformed an agency into a department of the

add anything to it. As a matter of fact, both quotations used by the 5th Circuit are imbedded in *Berkovitz* as underlined below:

> This limited waiver of sovereign immunity extends only to enterprises of Iran, not Iran itself. See *Security Pacific National Bank v. The Government and State of Iran,* 513 F.Supp. 864, 880 n. 23 (C.D.Cal.1981); cf. *Gibbons v. Republic of Ireland*, 532 F.Supp. 668, 672 (D.D.C.1982) (virtually identical treaty provision) ("This provision clearly waives the immunity of 'enterprises' of the Republic of Ireland owned by the state but is silent as to the sovereign itself.") Furthermore, this limited waiver extends only to enterprises "doing business" in the United States. See *Harris Corp. v. National Iranian Radio and Television*, 691 F.2d 1344, 1350 (11th Cir.1982); (emphasis added) *Berkovitz v. Islamic Republic of Iran*, at 333*d.*

Both cases are about lawsuits brought against the Government of Iran and its agencies. It is obvious that in that context, the waiver of immunity only extends to an Iranian agency if it has conducted business in the US. It is a negation of the reciprocity imbedded in the Treaty of Amity and its Article XI, to advocate that when an Iranian is suing a US agency, the waiver of immunity only extends to "those enterprises conducting business in the United States" as the 5th Circuit stipulates in its decision.[8] Its out of context

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Government of Iran (!) and thus exempted it from the waiver of immunity of Article XI.

[8] Significantly, Judge Hoyt while fully understanding the need for reciprocity argued that for the treaty clause to be applicable, the claims must arise "out of some action that the FAA must have done while (1) 'doing business' (2) in Iran". In our Appeal Brief we argued that the linkage of the action generating the claim, to the "doing business" in Iran, through the inclusion of the word "while" was erroneous and unwarranted, because neither *Berkovitz*, nor *Harris Corp.* on which the District Court based its arguments provide any "while" linkage.

quotation is so absurd that in effect as it now reads, the waiver of immunity *must apply to the FAA* because it is evident that the FAA has conducted business in the US. In its haste to do away with our well-founded arguments, the 5th Circuit has opened a loophole by which all US agencies must loose their immunity when facing an Iranian!

E. Violation of rights conferred by the Treaty of Amity

The Treaty of Amity as the Supreme Law of the Land confers through Articles IX and X certain rights, and provides through Article III.2, full jurisdiction "in defense and pursuit" of those rights.[9] If those rights are violated, jurisdiction must be granted. It is unequivocal unambiguous and succinct. Sovereign immunity is thus waived in respect to violation of rights conferred by a treaty approved by the Senate.

Since the FAA has used custom officials in France to perform security checks (uncontroverted fact), its security

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[9] Treaty of Amity

Article III. 2. Nationals and companies of either High Contracting Party shall have their juridical status recognized within the territories of the other High Contracting Party, *in all degrees of jurisdiction, both in defense and pursuit of their rights,* to the end that prompt and impartial justice be done. Such access shall be allowed, in any event, upon terms no less favorable than those applicable to nationals and companies of such other High Contracting Party or of any third country. It is understood that companies not engaged in activities within the country shall enjoy of such access without any requirement of registration or domestication (emphasis added).

Article IX. In the administration of its customs and regulations and procedures, each High Contracting Party shall: (a) promptly publish all requirements of general application affecting importation and exportation; (b) apply such requirements in a uniform, impartial and reasonable manner.

Article X. Between the territories of the two High Contracting Parties there shall be freedom of commerce and navigation.

policies can be categorized as custom procedures. And since they are not administered in a "uniform, impartial and reasonable manner" for Iranians, and are not "published" as required by Article IX, they clearly violate rights conferred by the Treaty of Amity.

In addition, Article X confers the right to freedom of navigation. The United States has argued at the International Court of Justice in The Hague that because of Iran's attacks against neutral shipping:

> "Substantial damages resulted, including increases in the costs of operating both US-flag and US-owned commercial vessels and the warships protecting them. Insurance and labour costs increased; steaming times increased; vessels were forced to carry smaller cargoes in order to pass through the relative safety of shallower waters", ICJ Gen. List 90, Order of March 10, 1998, *Case Conserning Oil Platforms, Islamic Republic of Iran v. United States of America,* no. 25.[10]

This is the *official US position* as to what constitutes an impediment to freedom of commerce. If the US, therefore the FAA, recognizes it as such in The Hague, it must do the same here. By comparison, we stated that the FAA designation of Iranians as a "suspect class" caused similar increases in costs. The cost items that we enumerated fit the US position in The Hague like a glove, albeit a smaller size glove. On the face of it, the similarity between the elements of our case and the US position in The Hague are so strong that a disagreement becomes a fact issue and a barrier to summary dismissal. If the US position has changed and such considerations can no longer be considered as impediments to freedom of commerce, the US needs to first inform The Hague. Otherwise, the Treaty of Amity makes available full

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[10] http://www.icj-cij.org/icjwww/idocket/iop/iopframe.htm

jurisdiction in pursuit and defense of the right to freedom of commerce.

VII. CONCLUSION

In 1947, the Nuremberg tribunal condemned Schlegelberger to life imprisonment for disregarding the law and upholding the "joy" of the Police force. This year, the 5th Circuit judges made a mockery out of justice in order to uphold the "joy" of the Intelligence Community. If not through reversal from this Court, history shall condemn their lack of foresight, and those who remained silent, as it did in the case of Nazi Germany.

Respectfully submitted on November 27, 2002:

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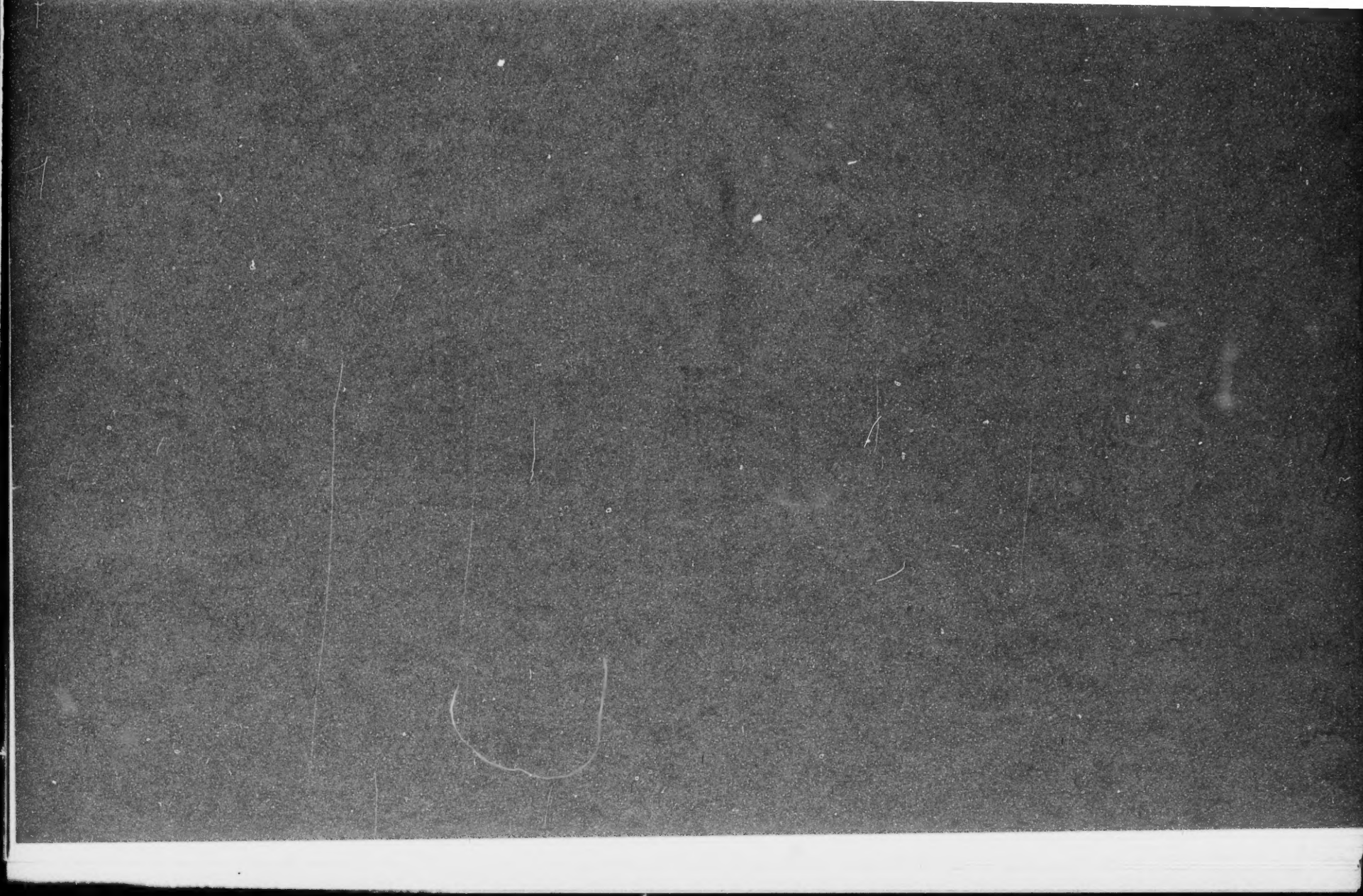
Appendix A

OPINION OF THE COURT OF APPEALS



UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 01-21089
Summary Calendar

ABOLALA SOUDAVAR,

Plaintiff-Appellant,

versus

FEDERAL AVIATION ADMINISTRATION,

Defendant-Appellee.

Appeal from the United States District Court
For the Southern District of Texas
USDC No. H-01-CV-344

Before REYNALDO G. GARZA, JOLLY, AND WIENER, Circuit Judges.

REYNALDO G. GARZA, Circuit Judge: [11]

Abolala Soudavar filed a *pro se* complaint against the Federal Aviation Administration ("FAA") alleging that he was subjected to extensive searches and inspections on account of his Iranian citizenship.

Soudavar now appeals the dismissal of his complaint for lack of subject matter jurisdiction and for failure to state a claim. This court will uphold a dismissal for failure to state a claim "only if, taking the plaintiff's allegations as true, it appears that no relief could be granted based on the plaintiff's alleged facts." *Bass v. Parkwood Hosp.*, 180 F.3d 234.340 (5th Cir. 1999). Determinations pertaining to the

[11] Pursuant to 5th Cir. R. 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4.

subject matter jurisdiction of a district court are reviewed de novo. *See United States v. Alvarado*, 201 F.3d 379,381 (5th Cir. 2000).

The United States and its agencies are immune from suit except upon waiver of sovereign immunity. See FDIC v. Meyer, 510 U.S. 471,475 (1994); *Rykers v. Alford*, 832 F.2d 895, 897 (1987). Waiver of the United States' sovereign immunity "must be expressly stated by congress and should not be inferred." *Interfirst Bank Dallas, N.A. v. United States*, 769 F.2d 299,310 (5th Cir. 1985).

Soudavar argues that under the Administrative Procedure Act, 5 U.S.C. 702, the United States waived sovereign immunity. The statute states that a "person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statue, is entitled to judicial review thereof," and that such an action shall not be dismissed on the ground that it is against the United States. 5 U.S.C. 702. When "review is sought not pursuant to specific authorization in the substantive statute, but only under the general review provisions of the APA, the 'agency action' in question must be 'final agency action"' *Lujan v. National Wildlife Federation*, 497 U.S. 871, 882 (1990). Whether an agency action is "final" hinges on several factors, including whether the action has the status of law with penalties for noncompliance; the directness and immediacy of the action's impact upon the plaintiff, and whether immediate compliance is expected. *See Taylor-Callahan-Coleman Counties Dist Adult Probation Dep't v. Dole*, 948 F.2d 953,958 (5th Cir. 1991).

Soudavar's claim must fail because there has been no final agency action. There is no evidence that Soudavar filed a complaint with the FAA concerning its screening practices. Moreover, Soudavar fails to establish an FAA policy of extensive screening of Iranian passengers.

Soudavar also argues that the Treaty of Amity, Economic Relations, and Consular Rights between the

United States of America and Iran ("Treaty of Amity") waives sovereign immunity. Soudavar's argument, however, fails, as the "limited waiver of immunity in the Treaty of Amity extends only to enterprises of Iran, not Iran itself." *Soudavar v. Islamic Republic of Iran*, 186 F.3d 671, 674-75. In fact, this waiver of immunity extends only to those enterprises conducting business in the United States. *See Berkovitz v. Islamic Republic of Iran*, 735 F.2d 329,333 (9th Cir. 1984).

As Soudavar challenges no other findings of the district court, he abandons any challenges to these remaining findings.

AFFIRMED.

Appendix B

FINAL ORDER OF THE DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

ABOULALA SOUDAVAR,
Plaintiff,

vs. Civil No. 01-344

FEDERAL AVIATION ADMINISTRATION
Defendant.

ORDER

Defendant has filed a Mtion for Reconsideration of the Court's Order entered on Jul6, 2001. The Court has considered the partie's legal arguments and hereby concludes that Defendant's Motion for Reconsideration shall be granted.

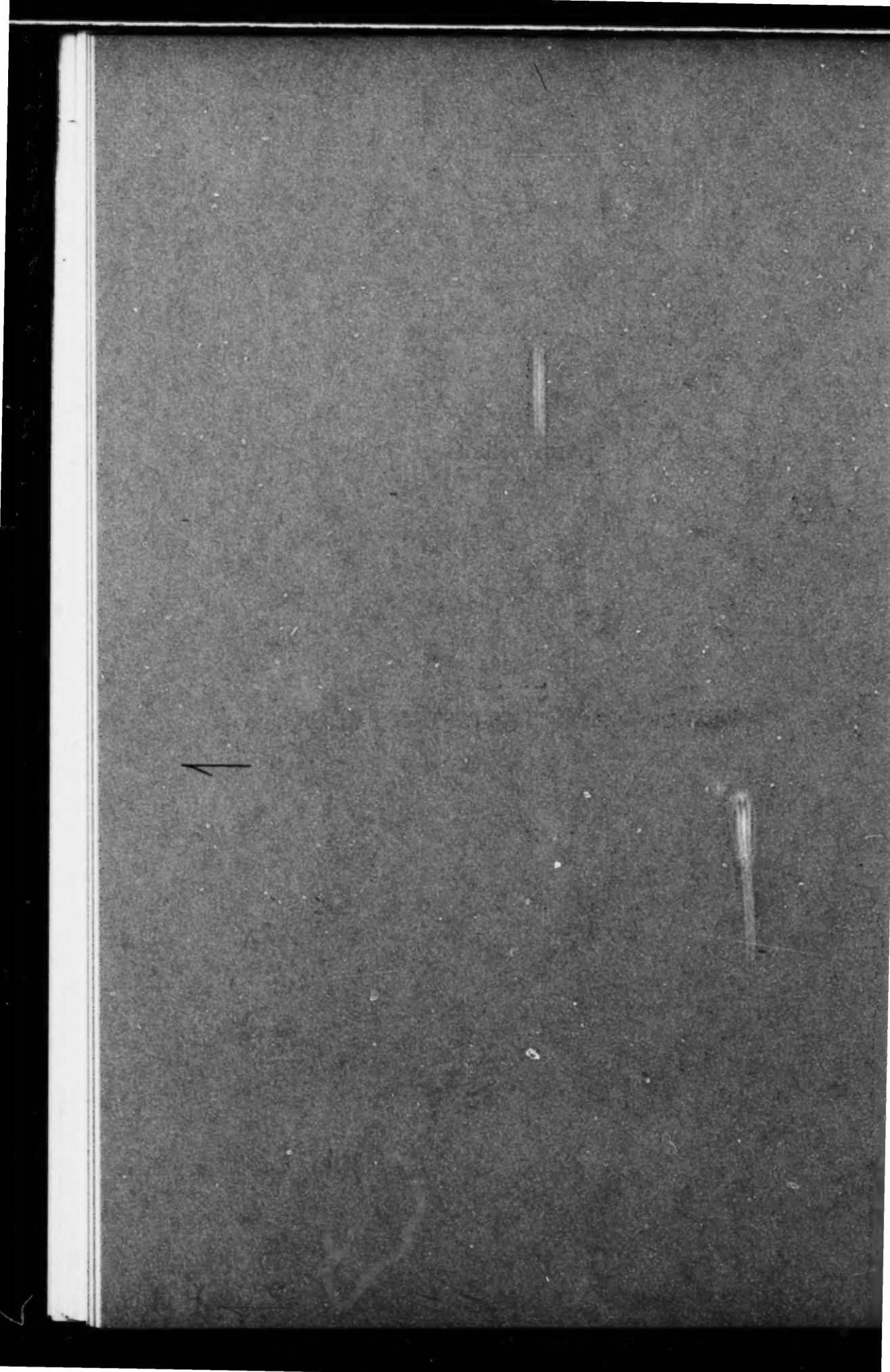
It is hereby, ORDERED that the defendant's motion to dismiss the Original Complaint is Granted. Plaintiff Abolala Soudavar's Original Complaint and Action are ORDERED DISMISSED with prejudice.

Signed on September 26, at Houston, Texas.

KENNETH M. HOYT
UNITED STATES DISTRICT JUDGE

Appendix C

MEMORANDUM OF THE DISTRICT COURT



IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

ABOULALA SOUDAVAR,
Plaintiff,

vs. Civil No. 01-344

FEDERAL AVIATION ADMINISTRATION
Defendant.

MEMORANDUM AND ORDER

INTRODUCTION

Pending before the Court is the defendant's Motion to Dismiss for Lack of Jurisdiction (Docket No. 5). Having carefully considered the motion, the response, the pleadings, the record and the applicable law, the Court is of the opinion that the defendant's motion should be partially DENIED.

STATEMENT OF FACTS

According to the plaintiff's pleadings and affidavit, the facts are as follows. Abolala Soudavar, a citizen of Iran, is a legal alien who frequently travels abroad on an Iranian passport. Despite the fact that he has resided in Houston, Texas since 1983, his trips abroad have been met with extensive – and onerous – security checks. Typically, his luggage is emptied, and his suitcases are x-rayed and scanned for explosives or other chemicals. In addition, the contents are checked by hand. Moreover, security officers abroad – and apparently here in the United States – have recently begun refusing to allow Soudavar to repack his own suitcases after inspection, citing FAA instructions.[12]

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[12] To the extent the Government asserts that the incidents abroad are irrelevant because they did not occur in the United States, these assertions miss Soudavar's point. They are relevant because Soudavar alleges that discriminatory security checks were made at the behest of the

After speaking to travel agents and other Iranians, Soudavar attributes these intrusions to be based solely on his nationality – the mere sight of an Iranian passport was sufficient to trigger a search. In the past, he alleges that security officers abroad never made any pretense at conducting a random check. This behavior, Soudavar asserts, has recently spread to the United States as well.

On December 20, 2000, Soudavar handed his passport to a counter attendant for Continental Airlines. Without opening it, the attendant immediately informed him that his luggage needed to be checked by security. This encounter is significant. Whereas former checks had been justified as random, here, the attendant confirmed that the search was automatic and due to his passport.

This process was repeated on January 8, 2001 at the London Gatwick airport to Soudavar and another Iranian passenger. This intensive search took approximately an hour, and when it was completed, the Iranians' bags were required to be left with the security officers of the Gatwick airport with no guarantee that the luggage would be transported onto the plane on time. "The English inspector's zeal is only directed towards the checking of the luggage and not sending it to the plane," states Soudavar. Luggage may remain in the security area half an hour after inspection; luggage that does not make it to the plane on time may not arrive until a few days later. "Invariably, small items such as camera [sic] or eyeglass accessories are lost in the searches rendering useless the completed item," notes Soudavar.

In contrast, Soudavar has observed that relatively few non-Iranians were searched, and non of these searches required the intensive procedures described above. When the inspections were completed, non-Iranians were allowed

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FAA. As such, if Soudavar can produce evidence of these events, they may be evidence of invidious discrimination by the FAA.

to collect their bags and take them to the gate. Incensed at this dual standard, Soudavar brings this action *pro se*.

STANDARD OF REVIEW

In adjudicating the Government's Motion, the Court largely concerns itself with a single question: whether Soudavar's claims must be dismissed for lack of subject matter jurisdiction. In evaluating whether subject matter jurisdiction exists, "[t]he issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." *See Scheuer v. Rhodes*, 416 U.S. 232 (1974*), overruled on other grounds by Harlow v. Fitzgerald*, 457 U.S. 800 (1982). Accordingly, courts must construe the complaint liberally, accept all uncontroverted well-pleaded facts to be true, and view all reasonable inferences in favor of the Plaintiff. *Id.*

CONTENTIONS OF THE PARTIES

Soudavar raises a number of contentions. He contends that he has suffered a violation of his due process and equal protection rights under the 5th and 14th Amendments. He argues that the FAA has violated the Treaty of Amity, Economic Relations, and Consular Rights Between the United States of America and Iran, 8 U.S.T. 899 (1957) (hereinafter, the "Treaty of Amity"). He asserts that the FAA procedures waste taxpayer's money and constitute a "breach of duty" inasmuch as they target the wrong suspects and prevent the FAA from focusing the " real issues." Finally, he argues that the FAA procedures show a lack of respect for human dignity, as well as basic rules of hygiene. As a result, he seeks $100,000 in damages as well as injunctive relief.

In response, The FAA erects a number of formidable barriers. First, the FAA argues that Soudavar's constitutional tort claims are barred by sovereign immunity, and do not fall within any exception. Second, it claims that

pursuant to the FTCA, Soudavar's allegations fail to state a cause of action. Similarly, the FAA asserts that because Soudavar would have no cause of action under Texas state law, he would have none under the FTCA. Next, it contends that Soudavar has failed to exhaust his administrative remedies as required by the FTCA. In addition, the FAA argues that Soudavar has failed to plead any cognizable violation of the Treaty of Amity against the FAA. Finally, the FAA contends that Soudavar's has no other bases for invoking jurisdiction.

DISCUSSION

Soudavar has alleged violations of the 5th and 14th Amendments. [13] Because Soudavar is a *pro se* plaintiff, the Court will construe his complaint broadly. *See Johnson v. Atkins*, 999 F. 2d 99,100 (5th Cir. 1993). The Supreme Court has applied a two-part framework for analyzing claims against the United States. *See FDIC v. Meyer*, 510 U>S> 471, 484 (1994). First, courts must inquire whether the Government has waived sovereign immunity. *Id.* Second, courts must ascertain whether a source of substantive law exists that provides an avenue of relief for the plaintiff. *Id.*

Soudavar's constitutional claims for damages

Although Soudavar's claims may be cast in tort – the area in which the FAA has expended the bulk of its defense – the Court believes that they are better analyzed as constitutional claims, and are thus subject to *Bivens* and its progeny. *See Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971).

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[2] At the outset, the Court notes that the FAA cannot be held liable under the 14th Amendment. The Constitution has two Due Process Clauses, a seeming redundancy that must prove confusing to non-practitioners. The 14th Amendment Due Process Clauses applies to states; the 5th Amendment Due Process Clauses applies to the federal government. Because Soudavar has brought suit against the FAA, and agency of the federal government, the 14th Amendment is simply inapplicable.

1. Sovereign Immunity

Before a court may address the merits of any case, it must first deal with the question of jurisdiction, for without jurisdiction, this Court may proceed no further. *See Meyer*, 510 U.S. at 475. One bar to jurisdiction is sovereign immunity. *Id.* It is well held that the United States may not be sued unless it expressly waives its sovereign immunity. *See United States v. Sherwood*, 312 U.S. 584,586 (1941) ("The United States, as sovereign, is immune from suit save as it consents to be sued"). This immunity extends to agencies of the United States. *Shanbaum v. United States*, 32 F.3d 180,182 (5th Cir. 1994). Any waiver must be "unequivocally expressed." *Id.* Thus, in order for Soudavar to recover monetary damages, he must first find some way by which the United States has waived its sovereign immunity.

a. The FTCA is inapplicable

In certain instances, the United States has waived its sovereign immunity via the Federal Tort Claims Act. 28 U.S.C. 1346(b), 2671-80 (2000). However, as the supreme Court explained in *Meyer*, torts arising under the Constitution are not actionable under section 1346(b). 510 U.S. at 477. In *Meyer*, the Supreme Court noted that under section 1346(b), the United States could only be liable to the same extent that a "private person" would be liable under "the law of the place where the act" occurred. *Id.* At 477 (quoting 28 U.S.C. 1346(b)). Because the Supreme Court had long held that "law of the place" meant law of the State, the *Meyer* Court concluded that no liability could arise for constitutional ports because they arose under *federal law*. Id. Thus, Soudavar's constitutional tort claims against the FAA are not actionable under section 1346(b).[14]

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[14] For the same reason, the United States itself is not be liable under the FTCA. Section 2674 renders the United States liable "in the same

b. The FAA has not waived its sovereign immunity

Nor has the FAA directly waived its sovereign immunity. The Secretary of Transportation may sue and be sued with regard to all activities carrying out chapter 53 of Title 49. 49 U.S.C. 5334(a)(2) (2000). Where Congress has permitted an agency to "sue and be sued," this constitutes a "broad" waiver of immunity, such that agencies are presumed to have fully waived immunity. *See Meyer*, 510 U.S. at 475, 480-81 (citations omitted). Arguably, the FAA may be sued if either Congress explicitly authorized it to be sued or "because the agency is the offspring of such a suable entity." *Blackmar v. Guerre*, 342 U.S. 512, 515 (1952).

Here, however, although Congress has authorized the Secretary of Transportation to sue and be sued, it has not authorized the FAA to be sued. *See Blackmar*, 342 U.S. at 515 (noting that because Congress did not authorize the Civil Service Commission to be sued in its own name, any suit was required to be brought against the *individual* Commissioners themselves). Nor may the FAA be considered the suable offspring of the Secretary of Transportation. *See Kundrat v. District of Columbia*, 106 F. Supp. 2d 1, 6 n.8 (D.D.C. 2000) (citing *Keifer & Keifer v. Reconstruction Finance Corp.* , 306 U.S. 381 (1939) (because Congress permitted Reconstruction Finance Corporation to be sued, and because the RFC was also empowered it to create regional subsidiaries, these "offspring" were implicitly suable "offspring")). This, the FAA retains its sovereign immunity.

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manner and to the same extend as a private individual under like circumstances." 28 U.S.C. 2674 (2000). Because Soudavar's claims are cast in constitutional terms, they do not arise under the "law of the place" as defined by the Supreme Court and thus, the FTCA is simply not implicated. *See Meyer*, 510 U.S. at 476-79.

2. No basis in substantive law

Even if this were not the case, however, Soudavar's claim for monetary damages would still fail in the alternative for want of *Meyer's* second requirement: a source of substantive law that provides an avenue for relief. *See Meyer*, 510 U.S. at 484.

Monetary damages may be recovered where an agent of the federal government has committed a constitutional violation, *See Bivens*, 403 U.S. 388; *see also Davis v. Passman*, 442 U.S. 288 (1979) (extending *Bivens*-type liability to 5th Amendment violations). However, it is well held that *Bivens* actions only apply to acts by *individuals*, not to agencies as a whole. *See Meyer*, 510 U.S. at 484. "We know of no Court of Appeals decision... that has implied a *Bivens*-type cause of action directly against a federal agency." *Id.* Nor have any arisen in the years since *Meyer*. *See Affiliated Professional Home Health Care Agency v. Shalala*, 164 F.3d 282, 286 (5th Cir. 1999).

There are reasons for this. *Bivens* liability is intended to provide a deterrent in the form of a financial disincentive against wayward behavior of individual officers. *Id.* Depleting the funds of an entire agency would not deter individual misbehavior. Rather, Bivens has determined that an officer may be best deterred from constitutional violations by threatening his pocketbook. Moreover, if "we were to recognize a direct action for damages against federal agencies, we would be creating a potentially enormous financial burden for the Federal Government." *Id.* at 486.

In this case, Soudavar has sued the FAA as a whole. In order to succeed, he must identify an individual member of the FAAA who has violated his constitutional rights. Failing that, his suit for monetary damages cannot proceed.

Soudavar's constitutional claims for injunctive relief

Soudavar's claims in equity, however, are another matter. The United States has waived sovereign immunity for constitutional torts seeking injunctive relief. 5 U.S.C. 702 (2000) states, in pertinent part that:

> An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States...

Section 702 has been held to waive sovereign immunity for claims seeking non-monetary relief.[15] *See Warner v. Cox*, 487 F.2d 1301,1304-05 (5th Cir. 1973) (*dictum* suggesting that 5th Circuit views section 702 to have waived sovereign immunity for non-monetary actions); *Assiniboine and Sioux Tribes v. Board of Oil and Gas Conservation*, 792 F,2d 782,786 (9th Cir. 1986) (holding that "section 702 dies waive sovereign immunity in non-statutory review actions for non-monetary relief brought under 28 U.S.C. 1331").

Indeed, even without explicitly resorting to section 702, courts have traditionally presumed that injunctive relief is available against federal actors who commit constitutional violations. *See Richmond Tenants Organization, Inc. v. Kemp*, 956 F.2d 1300, 1306 (4th Cir. 1992); *Reuber v. United States*, 750 F.2d 1039, 1061 (D.C. Cir. 1984), *overruled on other grounds by Kauffman v. Anglo-American School of Sofia*, 28 F.3d 1223 (D.C. Cir. 1994). Accordingly, the court denies the defendant's motion to dismiss Soudavar's claims for injunctive relief.

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[15] Contrary to the FAA's contention, Malone v. Bowdoin, bars only suits "specifically affecting property in which the United States claimed an interest." 369 U.S. 643 (1962) (action in ejectment)

Soudavar's claim arising from the Treaty of Amity

Like any other claim against the United States or its agencies, Soudavar must overcome the United States' sovereign immunity in order to raise a treaty claim. *See Meyer*, 510 U.S. at 474; *see also Foremost-McKesson, Inc. v. Islamic Republic of Iran*, 905 F.2d 438 (D.C. Cir. 1990) (applying doctrine of sovereign immunity to Treaty of Amity claim).

The FTCA does not waive sovereign immunity for this claim. Section 2674 of the FTCA renders the United States liable "*in the same manner... as a private individual under like circumstances.*" 28 U.S.C. 2674 (emphasis added). As discussed above, the Supreme Court in *Meyer* declined to apply the FTCA's waiver of sovereign immunity to a constitutional claim because the FTCA only permitted liability to the extent the federal government was liable under state law. *See Meyer*, 510 U.S. at 477-78. Similarly, in this case, because a treaty violation would not incur liability under state law, the FTCA does not waive sovereign immunity for an alleged violation of the Treaty of Amity.

Nor does the Treaty of Amity itself waive sovereign immunity. Although paragraph 4 of Article XI provides a limited waiver, it is inapplicable to the facts of this case.[16] Article XI's waiver extends to enterprises of Iran that are "doing Business" in the United States. *See Foremost McKesson, Inc. v. Islamic Republic of Iran*, 905 F.2d 438,452 (D.C. Cir. 1990) (citations omitted). Although this

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[16] Article XI, para. 4 of the Treaty of Amity provides in pertinent part:

No enterprise of either High Contracting Party, including ... government agencies... which is publicly owned or controlled shall, if it engages in commercial, industrial, shipping or other business activities within the territories of the other High Contracting Party, claim or enjoy, either for itself or for its property, immunity therein from... suit....

waiver might , in theory, apply to the United States – or its agency, the FAA – Soudavar must allege that his claims arise out of some action that the FAA has done while (1) "doing business" (2) in *Iran*. *Id; see also Soudavar v. Islamic Republic of Iran,* 186 F.3d 671, 674-75 (5th Cir. 1999). Because Soudavar's complaint alleges acts done in the United States, sovereign immunity is not waived by this mechanism, either.

In the end, the Court is of the opinion that the United States has not waived sovereign immunity in this case; accordingly, Soudavar's claims based on the Treaty of Amity are barred by sovereign immunity.

Soudavar's remaining claims

Finally, Soudavar asserts that FAA procedures waste taxpayer's money and constitute a "breach of duty" inasmuch as they target the wrong suspects and prevent the FAA from focusing on "real issues," he has failed to state a claim for which relief may be granted. Similarly, he argues that the FAA procedures show a lack of respect for human dignity, not to mention the basic rules of hygiene. Although evidence of these facts may be relevant to Soudavar's constitutional claims, to the extent he alleges them as separate claims , they are dismissed pursuant to Federal Rules of Civil Procedure, Rule 12(b)(6) for failing to state a claim for which relief may be granted.

CONCLUSION

For the foregoing reasons, the Court partially DENIES the defendant's Motion to Dismiss.

It is so ORDERED.

Signed this 5th day of July, 2001.

KENNETH M. HOYT
United States District Judge

Appendix D

EXCERPTS FROM
Petitioner's Original Complaint

(excerpts from Petitioner's Original Complaint, pp. 6-10)

THE FAA POLICIES

The systematic search of a class of resident aliens clearly means that the FAA is considering them as a threat to the security of airplanes. The question is what is this real or imaginary threat? Even though the FAA and the airlines refuse to divulge security directives, let alone the rational for establishing them, the very nature of the search reveals the FAA perception of "threat." Indeed, it cannot be the prevention of export or import of arms, bombs or other related material, for that would fall under the competence of custom officials at the departure or destination points. Therefore it perceives a threat on-board as opposed to on ground. There are only two possibilities for on-board threats:

One perceived threat is that of an unsuspecting passenger carrying a package remitted by a malevolent person. To counter this eventuality, airline check-in personnel nowadays systematically ask passengers the two famous questions: whether the passenger packed his or her own suitcase and whether anybody remitted him or her a package. If this measure is ineffective with unsuspecting Iranians it must be for others as well, and therefore everybody should be subjected to hand-search. Moreover, it is clear that there is no logical reason to think that only unsuspecting Iranians can be given a bomb-carrying package and no other nationalities.

The other threat is that of an on-board explosion. The latter used to have a simple and effective countermeasure generally referred to as "luggage match": as it was assumed that nobody was foolish enough to blow the airplane on which he was riding, airlines had to make sure that all passengers who had checked in a baggage had boarded the plane and remained there. The security laps that led to the infamous explosion of Pan Am 104 over Lockerbie was due

to faulty application of this countermeasure, for the suitcase that exploded on board was loaded in Malta and was transferred to Pan Am while no passenger owner of said suitcase had boarded the plane. If the FAA recognizes a threat that cannot be remedied by the above-mentioned procedures it can only be the threat of a suicidal agent willing to sacrifice his life as well as hundreds of innocent passengers. A suicidal agent though is a rare breed, one that must have undergone intense training and brain-washing sessions, a process that the FBI must surely be able to detect before hand amongst US residents, and tag *individual* suspects rather than designate *all* Iranian resident aliens as a suspect class.

A suicidal agent's objective is to make a point with a "big bang" so to speak. As far as the FAA is concerned, the relevant question then is what is the evidence for Iranian US-residents ever carrying a suicidal mission, or attempting or planning one? And how does this probability compare for instance with Timothy McVeigh type anti-government Americans, anti-technology people such as the Uni-bomber, angry youths like the Colombine killers, angry airline employees, schizophrenics, mentally depressed people - millions of which are on Prozac - and sensation seekers. Can the FAA produce any statistical or other evidence that the threat posed by Iranian US-residents as a group is more than the aforementioned ones?

US POLICIES

The suicidal attacks on US outposts such as the Al-Khobar barracks in Saudi Arabia has unfortunately created a belief that all Muslims are fanatical and ready to take suicidal missions. The problem though is that the most outspoken US foes and suicidal agents are veterans of the Afghan wars whose activities were jointly financed by US and Saudi Arabia through the agency of Pakistan. Their ranks grows larger by the day as they are joined by new recruits educated in Northern Pakistan through

fundamentalist schools that raise fanatical young men to despise the US (exhibit 3).[17] Saudi money still provides the financing of these schools. And therein lies the problem. It is difficult for the US intelligence community to admit that these monsters are their own creations, and that their staunch allies, the Saudis, are still helping them. In this perspective, the designation of Iranians as a suspect group is counter productive because attention is focused on the wrong group while danger lurks elsewhere. So oblivious then US intelligence can become to real danger that a large US target such as the Cole cruiser, is left unprotected as a sitting duck in the hotbed of Afghan war veterans that is the Yemen. And the result is the tragedy that we all know with real losses of US service men and women.

Besides the now famous Osama bin Laden, other Saudis have been involved in attacks against the US (e.g. in the Al-Khobar attack and the blowing up of the Nairobi embassy). Other members of the Nairobi team were a Jordanian and a Lebanese born American.[18] Does the FAA still believe that the Saudis, Jordanians and Lebanese, whose governments are considered as most friendly, pose a lesser danger than the Iranians residing in the United States? An extensive study of the New York Times names Egypt, Malaysia, Algeria, Philippines and Morocco as other recruiting grounds for the Bin Laden group while no Iranian connection is mentioned whatsoever (exhibit 4).[19] And yet, it is the Iranian residents of the United States who are considered as prime suspects by the FAA and whoever supplies them with intelligence report. While all attention was focused on searching Iranians, and finger printing them

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[17] "The Education of a Holy Warrior" by J. Goldberg, *The New York Times Magazine*, June 25, 2000.

[18] See "U.S. to Offer Detailed Trail of bin Laden in Bomb Trial," by B. Weiser, *New York Times*, January 13, 2001,

[19] "One Man and a Global Web of Violence" by S. Goldberg, in *New York Times*, January 14, 2001

left and right, a Saudi suspect who was under *surveillance,* was able to participate in the Nairobi bombing, and after apprehension, his warnings of a planned attack in Yemen were overlooked and not heeded (exhibits 5 and 6).[20] If suspects are to be classified by nationality, Saudis should come before Iranians, and yet they are not subject to systematic search.

But cronyism and ineptitude are the hallmarks of the US intelligence community as a whole. For decades, it spent over 30 billion dollars a year to project the image of a titanic Red Army that today cannot do away with a bunch of bandanoed Chechen rebels within their own territories. It is so inept at using available information and relies so much on electronics that during the Iran-Iraq war, an Iran airline passenger plane on regularly scheduled flight was perceived as a threat by the US Navy and shot at, killing all passengers aboard. In a ridiculous display of cronyism, instead of penalizing the culprits, the captain of the ship who shot the Iranian passenger plane was awarded a medal for his exploits. Result: the same mistake sprang up in the bombing of Belgrade; the Chinese Embassy which was on every city map and telephone directory, was hit as a viable Serbian target!

The US Government plays political games. One day it declares the Iranian government as an outlaw but the next day covertly sells arm to it; it bans importation of all "goods of Iranian origin" but makes exception for oil, thereby punishing the Iranian people in their trade efforts with the US while allowing a huge oil income to continue for the government that they proclaim be punishing. In this political

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[20] "U.S. to Offer Detailed Trail of bin Laden in Bomb Trial" by B. Weiser, *The New York Times*, January 13, 2001; and "Embassy Suspect Warned U.S. of Yemen Attack" by B. Weiser, *The New York Times,* January 18, 2001. Significantly, the Cole investigation couldn't single out the Cole crew as scapegoats since the real problem was one of intelligence failure, see "Defense Chief Cites Collective Blame on Cole" by S. Lee Myers, *New York Times,* January 20, 2001.

game it may designate Iran as a "rogue" nation, but said designation can only apply to the government of Iran and cannot apply to its citizens, especially legal aliens residing in the United States who according to *United States v. Wong Kim Ark* (supra) must enjoy the same protection under the law as US citizens.

Iranians residing in the US are mostly unsympathetic to the present regime of Iran, and as a class, cannot be considered allies or agents of a "rogue" government (see exhibit 7).[21] They are generally here "by virtue of circumstances beyond their control", namely the Islamic Revolution of 1979, and as a "disfavored" group should not be subject to procedures in contravention of the 14th Amendment; *Plyler v. Doe* (supra). Furthermore, it is well known that "rogue" nations and criminal organizations regularly recruit operatives of different nationalities and/or provide them with falsified passports. As a matter of fact, the only crime committed by an agent of the Islamic Republic of Iran on US soil was the murder of an Iranian subject by a Black-Muslim American. One wonders then if based on this evidence and by FAA logic, all Black-Muslim Americans, or all African-Americans or all Americans should be classified as a suspect group!

While US intelligence and the FAA have every right and duty to secure the safety of airline passengers, it is important that they focus on real danger, free of political rhetoric, and that they implement judicious policies without exercising "[a]rbitrary power," and without "enforcing its edicts to the injury of the persons and property of its subjects," *Hurtado v. California* (supra). What the FAA does is racial and ethnic profiling. What's worse is that it does it so blatantly as to require a "PROFILE" labeled tag (see exhibit 8) for Iranian passenger bags! It is wrong, it is unjust and it is injurious.

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[21] "Iranians In Southland Flex Political Muscle" By S. Sarhaddi Nelson, *Los Angeles Times* - July 17, 2000